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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL., PETITIONERS

v.

CENTRAL TRANSPORT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, permits the trustees of a multiemployer employee benefit plan to audit records of an employer participating in the plan to verify that the employer is making contributions on behalf of all employees for whom they are due.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 82-2157

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL., PETITIONERS

v.

CENTRAL TRANSPORT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case will clarify the authority of trustees of a multiemployer employee benefit plan that is subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (Multiemployer Act), Pub. L. No. 96-364, 94 Stat. 1208 *et seq.*, to verify, by appropriate audits of the records of employers participating in the plan, that the employers are remitting contributions on behalf of all employees for whom they are due. The United States has a substantial interest in the proper resolution of this issue.

The Secretary of Labor is charged with administering the employee benefit rights protection provisions (Title I)

of ERISA. Failure to recognize auditing authority in employee benefit plan trustees sufficient to enable them to enforce employer contribution and funding obligations would shift to the Secretary the burden of detecting contribution delinquencies—a burden that Congress intended to be borne by plan trustees. It would also threaten the integrity of the plans that the Secretary has been directed to protect. In addition, the court of appeals' decision, by undermining the efficacy of fiduciary safeguards for assuring that all required employer contributions are made, has the potential to impose financial burdens upon the employee benefit plan termination insurance fund established pursuant to Title IV of ERISA, and to impose administrative burdens upon the Pension Benefit Guaranty Corporation, a wholly owned government corporation that administers the insurance program.

This Court recognized the substantial interest of the United States in the question presented by inviting the Solicitor General to express the government's views at the petition stage. The United States filed a brief as amicus curiae in support of the Petition.

STATEMENT

1. Petitioners are multiemployer employee benefit plans subject to ERISA and the Multiemployer Act (29 U.S.C. 1001 *et seq.*). Petitioners provide health, welfare and pension benefits to certain persons whose employers are engaged in interstate trucking. Respondents are 16 interstate trucking companies. Each of the petitioner benefit plans was created by a trust agreement entered into by multiemployer associations to which respondents belong and various local affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.[1] By the terms of the National Master Freight Agreement, a collective bargaining agreement to which the

[1] The trust agreements covering the Pension Fund and the Health and Welfare Fund are identical in all material respects. References hereinafter are to the provisions of the Pension Fund trust agreement, which is reproduced at Pet. App. A43-A49.

union and respondents are signatories, respondents are required to make weekly contributions to petitioners for each employee "covered by the agreement." An employee is "covered," irrespective of union membership, if he or she is employed in a particular job classification described in the collective bargaining agreement.[2] Respondents have expressly agreed to be bound by the trust agreements governing the petitioner funds. Pet. App. A1-A5, A16. Under the trust agreements, covered employees are entitled to certain benefits providing that they satisfy stated preconditions.

The trust agreements require each participating employer to make "continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement" (Art. III, § 1 (Pet. App. A44)). The agreements establish boards of trustees to administer the Funds and require the trustees "to demand and collect the contributions of the Employers to the Fund" and to "take such steps, including the institution and prosecution of * * * any legal proceedings as the[y] * * * in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of [employer] contributions * * * owed to the Trust Fund" (Art. III, § 4 (Pet. App. A45)).

In order to facilitate the trustees' performance of their collection and enforcement responsibilities, Article III, Section 5 of the trust agreements provides (Pet. App. A46):

> Each Employer shall promptly furnish to the Trustees, upon reasonable demand the names and current addresses of its Employees, their Social Security numbers, the hours worked by each Employee and past industry employment history in its files * * *.

In addition, each employer is required to supply *(ibid.)*:

> such other information as the Trustees may reasonably require in connection with the administration of the Trust.

Article III, Section 5 of the trust agreements provides as well that (Pet. App. A46):

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[2] Respondents allege that 60% of their employees are not covered (Pet. App. A8, A94).

> The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust.

The trust agreements provide that Fund trustees may construe the provisions of the trust agreements; any construction adopted by the trustees in good faith is binding on employers, the union and employees (Art. IV, § 17 (Pet. App. A27, A48)). Furthermore, by the terms of the collective bargaining agreement and implementing agreements providing for respondents' participation in the Pension and Health and Welfare Funds, respondents agreed to be bound by all actions of the Funds' trustees (Pet. App. A3-A4). Finally, the trustees are empowered by the trust agreements "[t]o do all acts, *whether or not expressly authorized herein*, which the Trustees may deem necessary or proper for the protection of the property held hereunder" (Art. IV, § 14(e) (emphasis added) (Pet. App. A27, A45, A47)). See generally *Schneider Moving & Storage Co.* v. *Robbins*, No. 82-1860 (Apr. 18, 1984), slip op. 4-5.[3]

2. In late 1979, petitioners contacted respondents to arrange a "periodic review[] of participating employer contributions for the benefit of Plan Participants and their Beneficiaries," including a "[d]etermination of eligible Plan Participants covered by Collective Bargaining Agreements" (Pet. App. A6-A7). During the course of this audit, in February and March 1980, respondents furnished petitioners' audit staff with only part of the information they requested. Respondents provided payroll registers for those employees whom respondents deemed covered by the collective bargaining agreement. In addition, respondents produced insurance exception listings, which are documents prepared monthly listing the individuals and time periods for which respondents acknowledged an obligation to make contributions to the trust funds. *Id.* at A85-A86.

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[3] The trust agreements involved in this case are the same ones interpreted by the Court in *Schneider Moving & Storage Co.*

Based on the limited information provided, petitioners' auditors discovered substantial reporting and contribution deficiencies, including respondents' failure to pay sums owed to the Funds totalling in excess of $268,000. Specifically, the auditors found that respondents had failed promptly to report newly-hired employees, had reported premature termination dates for departing employees, had failed to contribute for employees who worked part of a week during a strike, and had failed to contribute for employees who were on sick leave. The auditors also discovered four instances in which respondents had made contributions for an individual not listed on the various documents that purportedly contained the names of all covered employees. Pet. App. A7, A83-A84, A87. Despite petitioners' request, however, respondents refused to provide tax forms and complete payroll ledgers that included information regarding employees who respondents claimed were not covered (*id.* at A7, A86). At respondents' direction, the auditors left respondents' premises on March 28, 1980 without completing their audit (*id.* at A7, A88).

3. Petitioners commenced this action in the United States District Court for the Eastern District of Michigan pursuant to Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. 185(a), and Section 502 of ERISA, 29 U.S.C. 1132, alleging that respondents failed accurately to report, and to remit benefit fund contributions for, all employees covered by the collective bargaining agreement (Pet. App. A1-A2). The relief sought by the plan trustees included an injunction directing respondents to allow a complete audit of their payroll records in order to enable the trustees to verify that respondents had correctly reported all covered employees and had made all required contributions. Petitioners maintained that, without such an independent audit, they would be unable to ensure the financial integrity of the benefit funds or to fulfill their fiduciary obligations to the plans' participants and their beneficiaries. Pet. App. A2. The district court agreed, and held (*id.* at A8-A14) that petitioners had both a contractual right under various provisions of the trust agreements and a statutory obligation under ERISA to audit respondents'

payroll records "to independently verify the status and duties of all individuals employed by [respondents] in order to insure that proper benefit contributions are being made" (*id.* at A3).

4. The court of appeals reversed (Pet. App. A15- A34). The court initially held (*id.* at A18-A20) that ERISA does not itself afford petitioners any authority to audit respondents' records "to independently verify whether any given employee is covered by the collective bargaining agreements" (*id.* at A19). The court of appeals acknowledged that ERISA imposes broad fiduciary duties on benefit plan trustees. 29 U.S.C. 1104. The court reasoned, however, that because the Act also specifies that fiduciaries must act "solely in the interest of [plan] participants and beneficiaries," and must act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with" the Act (Pet. App. A19 (quoting 29 U.S.C. 1104(a)(1)), ERISA does not sanction exercise of auditing authority by the trustees. The court of appeals stated (Pet. App. A19-A20):

> [T]he provisions of ERISA require reference to the terms of the collective bargaining agreements and the trust agreements to determine who are the participants and beneficiaries to whom statutorily imposed duties are owed and to the terms of the trust agreements to determine what the precise nature of those duties are.

The court of appeals held, moreover, that the trust agreements did not authorize the trustees to undertake the audit contemplated, either. The court of appeals initially concluded that the trust agreements define the term "employees" to include only workers covered under the benefit plans and that the trustees' right under Article III, Section 5 to demand pertinent information on "employees" accordingly did not extend to persons other than those covered by the plans (Pet. App. A20-A26). Additional language in Article III, Section 5 that requires an employer to furnish other information reasonably required by the trustees, and to produce pertinent records for the trustees' examination (see pages 3-4, *supra*), was also dismissed as insufficient to

afford the trustees the audit authority claimed (Pet. App. A26). The court reasoned that this language " 'can only refer to information reasonably required as to "covered" employees additional to the records specifically listed'" (*ibid.*, quoting *Central States, Southeast & Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616, 619 (8th Cir. 1981)).

The court of appeals did recognize a contractual basis for the trustees' exercise of a tightly circumscribed auditing authority extending beyond records on persons conceded by an employer to be covered by the employee benefit plan (Pet. App. A27-A31). The court inferred that language in the trust agreements expressly mandating that trustees collect contributions owed by employers (see Art. IV, § 2 (Pet. App. A47)) and granting them power to protect trust assets by taking acts not otherwise explicitly authorized (see Art. IV, § 14(e) (Pet. App. 47)) required the trustees to "ensure that contributions to the Funds correlate with disbursement of benefits from them" (*id.* at A29). The court premised this conclusion in part upon the common law principle that "[p]owers may be inferred or implied from the terms of the governing instruments read as a whole, from an express directive to accomplish a particular goal unaccompanied by express directives on the ordinary and natural means of obtaining that result, and from the purposes of the trust" (*id.* at A28).

Notwithstanding this analysis, the court of appeals held that the trustees' auditing authority is "confined to factual situations in which the trustees have reasonable cause to believe that a particular person is covered by a collective bargaining agreement but has not been * * * classified * * * as a covered employee" (Pet. App. A29). The court of appeals explained that the trustees' authority under the trust agreement is "limited * * * by ERISA" (*id.* at A27). The court believed that the trustees' statutory duties to administer the Fund exclusively in the interest of participants and other beneficiaries precluded them from reviewing employment records of non-covered employees (*id.* at A29). The court of appeals' conclusion appears to rest upon the view that it would be "arbitrary and capricious"—and thus

an imprudent expenditure of plan assets inconsistent with a fiduciary's obligations under ERISA—to undertake an audit designed to ferret out underpayments, absent reasonable cause to suspect that an employer has failed to make required payments in the case of a particular employee (*id.* at A29-A30).

The court of appeals also concluded that limiting the trustees' auditing authority to instances in which there is cause to believe that required contributions have not been made for an identified employee was consistent with traditional labor relations principles (Pet. App. A30-A31). The court observed that "[c]overage under the terms of a collective bargaining agreement has traditionally been within the province of the employer and union" (*id.* at A30). The court of appeals believed that limiting the trustees' audit authority "preserves the privacy [*sic*] and integrity of the grievance and arbitration provisions agreed to by [respondents] and the Union as a means of resolving questions of employee coverage" (*id.* at A31).

Applying the limited auditing right it had recognized, the court of appeals concluded that petitioners were entitled to review only respondents' records covering the four individuals as to whom respondents had made trust fund contributions without listing the individuals as covered (along with the records covering those employees respondents conceded to be covered). Any broader audit was deemed "outside of [the trustees'] statutorily and contractually imposed duties, express or implied, as a matter of law" (Pet. App. A32).

SUMMARY OF ARGUMENT

I

A. The court of appeals improperly limited petitioners' authority to conduct an audit of contributing employers' payroll records to assure that all contributions owed to the employee benefit plan are being paid. Recognizing the importance of pension and welfare plan benefits to the financial well-being of millions of persons, Congress required in ERISA that employee benefit plan assets be held in trust. Invoking established trust law doctrine, Congress sub-

jected plan officials to strict fiduciary standards of conduct. Among the implied fiduciary duties recognized under the law of trusts is the trustees' fundamental obligation to collect trust assets. This obligation, like those expressly established by the pertinent trust agreement, may be carried out both through powers explicitly conferred upon the fiduciary and through the trustees' inherent authority to use ordinary and natural means to obtain the results mandated by the trust.

B. An audit of a participating employer's payroll records is a reasonable and appropriate means of carrying out the trustees' obligation to collect all contributions due to the plan. Indeed, in light of the substantial opportunities that exist for misclassification or underpayment by employers, especially in multiemployer plans, such an independent check on the accuracy and completeness of an employer's coverage determinations must be available to plan trustees if they are to provide meaningful protection for plan participants. Generally accepted auditing standards and common sense support the view that an employer's omissions in listing covered employees and making contributions on their behalf can only be detected by audit procedures that look beyond records on those employees the employer concedes to be covered.

The legislative history of ERISA confirms the importance of plan trustees' auditing authority. Ensuring full funding of pension plan benefits through timely payment of employer contributions was one of the Act's principal objectives. Moreover, Congress recognized that special features of employee benefit plans—including the large number of participants and the inability of individual participants and beneficiaries effectively to guard their own interests—mandate that plan fiduciaries act vigilantly and vigorously to guard plans' financial soundness.

The court of appeals' justifications for departing from these principles are insubstantial. Review of payroll records necessary to detect covered employees whom a participating employer has failed to acknowledge is not inconsistent with the statutory requirement that fiduciaries act on behalf of beneficiaries and participants. Nor is a limitation

of auditing authority to employer payroll records on individuals as to whom there is already reasonable cause to suspect employer delinquencies consistent with, much less required by, fundamental notions of prudence. Audits that are carefully staged in conformity with generally recognized accounting procedures enhance, rather than threaten, plan assets.

C. The reporting and disclosure requirements of ERISA offer further evidence that plan trustees are vested with authority to independently verify the accuracy and completeness of employer contributions. Financial statements and schedules in annual reports that plan trustees are required to file with the Secretary must be certified as sound and accurate under generally accepted auditing standards. Those standards require assurance that a plan has disclosed all contributions due. The annual reports must also disclose the number of plan participants. Congress plainly understood that plan officials had the authority to verify data needed to meet these requirements. Indeed, 29 U.S.C. 1059 directly requires employers to provide trustees of multiemployer plans with information necessary to ascertain which of the employers' workers is covered by the benefit plan.

D. The court of appeals' decision frustrates ERISA's overriding objective: to assure the financial security of employee benefit plans. By design or mistake, participating employers sometimes fail to remit full contributions due on behalf of all participants. If these contribution deficiencies go undetected they can lead to inadequate funding of the plans involved. The court of appeals' ruling undercuts efforts to ensure proper funding by encouraging employers to refuse to cooperate with trustees performing their fiduciary duties.

II

Contrary to the conclusion of the court of appeals, the trust agreements in this case plainly grant petitioners the auditing authority they seek. The agreements provide that contributing employers must furnish the trustees with any information reasonably required in their administration of

the trust and must afford access to employer records when examination is deemed advisable by the trustees. Trustees may also undertake any action necessary to protect trust assets. Petitioners' interpretation of these provisions as providing for their exercise of audit authority is reasonable and should be sustained.

ARGUMENT

I. ERISA RECOGNIZES THE AUTHORITY OF EMPLOYEE BENEFIT PLAN TRUSTEES TO AUDIT A PARTICIPATING EMPLOYER'S PAYROLL RECORDS TO VERIFY THAT THE EMPLOYER IS MAKING ALL CONTRIBUTIONS THAT ARE DUE

A. ERISA Requires Trustees To Employ Prudent And Appropriate Means To Collect And Preserve Plan Assets

After extensive study of the operation and failings of private employee pension and welfare benefit plans, Congress enacted the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* ERISA was designed to redress major deficiencies in plan functioning found to implicate "the continued well-being and security of millions of employees and their dependents" by establishing "minimum standards * * * assuring the equitable character of such plans and their financial soundness" (29 U.S.C. 1001(a)). Congress wished to "mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). Accord, *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, No. 83-245 (June 18, 1984), slip op. 2. To achieve this end, Congress required that "all assets of an employee benefit plan shall be held in trust" (29 U.S.C. 1103(a)). See S. Rep. 93-127, 93d Cong., 1st Sess. 29-30 (1973); H.R. Rep. 93-533, 93d Cong., 1st Sess. 11-13 (1973). In order "to make as certain as possible that pension fund assets would be adequate" to pay benefits due, Congress

also "prescribed standards of conduct for plan" fiduciaries (*Nachman Corp.*, 446 U.S. at 375).[4]

The fundamental standards of conduct for trustees are set forth in Section 404 of ERISA, 29 U.S.C. 1104. Congress required employee benefit plan fiduciaries to discharge their duties with respect to the plan "solely in the interest of the participants and beneficiaries" and with the "care, skill, prudence and diligence" that a prudent person "familiar with such matters" would employ if acting under similar circumstances. 29 U.S.C. 1104(a)(1). Congress also required fiduciaries to discharge their duties "in accordance with the documents and instruments governing the plan insofar as [they] are consistent with [ERISA]." 29 U.S.C. 1104(a)(1)(D).

In outlining the responsibilities of benefit plan fiduciaries, Congress deliberately declined to enumerate the powers and duties of trustees, choosing instead to invoke the common law of trusts. The House and Senate Reports each explain: "The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts" (S. Rep. 93-127, *supra*, at 29; H.R. Rep. 93-533, *supra*, at 11). See *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 332-333 (1981). Thus, the trustees' statutory obligations to act in a prudent manner and with utmost fidelity to the interests of participants and beneficiaries are defined by reference to the duties and powers of trustees recognized in the common law.

The law of trusts recognizes fundamental fiduciary duties that arise by virtue of the trust relationship. Trustees have a common law duty to take necessary steps to preserve and maintain trust assets. G.G. Bogert & G.T. Bogert, *The Law of Trusts and Trustees* § 582 (rev. 2d ed. 1980) [hereinafter cited as Bogert]; 2 A. Scott, *The Law of Trusts*

[4] Congress was equally concerned that welfare benefit plans, which frequently pay benefits out of current contributions, be able to deliver promised benefits. See *Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045, H.R. 1046 and H.R. 16462 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st & 2d Sess. 471-472 (1969-1970).

§ 175 (3d ed. 1967). Acts traditionally deemed necessary to preserve trust assets include identifying the trust assets, holding the settlor to his obligation to deliver the assets, and asserting control over the assets. Bogert § 583, at 348-350, 355-356. Trustees also have a duty to investigate the identity of beneficiaries for the purpose of notifying them of gifts made for their benefit. Bogert § 583, at 348; see *Rosen* v. *Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592, 600 (3d Cir.), cert. denied, 454 U.S. 898 (1981).

Moreover, under the law of trusts made applicable to employee benefit plans by ERISA, the authority available to trustees to carry out their fiduciary duties includes not only the fiduciaries' express powers, defined by the instrument creating the trust, but also powers implied from the terms and purposes of the trust. Bogert § 551, at 3, 41. Among those implied powers is the trustee's authority to "use the ordinary and natural means" for obtaining the result dictated by the settlor. *Id.* § 551, at 41; Restatement (Second) of Trusts § 186 (1959); 3 A. Scott, *supra*, § 186, at 1496.[5]

B. An Audit Of A Participating Employer's Complete Payroll Records Is An Appropriate Means For Trustees To Ensure That The Employer Is Contributing On Behalf Of All Covered Employees

1. In order to fulfill their express statutory duty to act with fidelity to the interests of plan participants and beneficiaries, and their implied duties to collect trust assets and identify the beneficiaries, trustees must ensure that an employer is making appropriate contributions for all covered

[5] A trustee's duty to maintain trust property by ordinary and natural means gives rise to manifold diverse powers, each appropriate to particular circumstances confronted by the trustee. For instance, trustees have been held to possess authority to repair or improve property to preserve its value, to mortgage or lease real estate to raise needed revenue, and to maintain suit against the settlor or others to secure possession of the assets. See, *e.g.*, *Spooner* v. *Dunlop*, 87 N.H. 384, 180 A. 256 (1935); *Upham* v. *Plankinton*, 152 Wis. 275, 140 N.W. 5 (1913); *Home for Destitute Crippled Children* v. *Boomer*, 320 Ill. App. 541, 51 N.E.2d 830 (1944).

employees. Trustees of an employee benefit plan have an obligation to safeguard not only the interests of those employees who the employer acknowledges are covered, but also the interests of unidentified, but covered, employees for whom the employer is not making contributions. In addition, in a multiemployer plan, the trustees not only protect the interests of all participants, but effectively protect participating employers generally against liability for underfunding resulting from deficiencies in the contributions of any particular employer. In sum, benefit plan trustees have an unqualified "obligation to *enforce* the terms of the collective-bargaining agreement regarding employee fund contributions against the employer." *NLRB* v. *Amax Coal Co.*, 453 U S. at 332, 337 (emphasis in original).[6] Accord, *Nedd* v. *United Mine Workers of America*, 556 F.2d 190, 212 (3d Cir. 1977); *Laborers Health & Welfare Trust Fund* v. *Kaufman*, 707 F.2d 412, 416 (9th Cir. 1983).

To fulfill these obligations, and to avoid effecting a prohibited extension of credit to an employer who is delinquent in his contributions (see 29 U.S.C. 1106(a)(1)(B)), trustees must develop "reasonable, diligent and systematic methods for the review of employer contribution accounts [including] field audits." Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740, 12741 (1976). Accord, *Nichols* v. *Trustees of Asbestos Workers Pension Plan*, 3 Empl. Ben. Cas. (BNA) 1726, 1732 (D.D.C. 1982). Ultimately, trustees must "take action against employers who fail to contribute to the fund as required by the plan" (*Rosen* v. *Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d at 600).

An audit of a participating employer's payroll records is an ordinary and natural means for trustees to enforce the employer's obligation to contribute for each covered employee. See Prohibited Transaction Exemption 76-1, *supra*. Unless an employer's records disclosing the identity of employees and the nature of their employment are available for the trustee's examination, the trustees will be obliged to rely upon the good faith and the correctness of unilateral

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[6] As the Court emphasized in *Amax Coal Co.*, trustees may not "compromise the claims of the union or the employer with regard to the latter's contributions" (453 U.S. at 336).

employer determinations as to coverage under the collective bargaining agreement. Such unquestioning reliance is inconsistent with the fundamental statutory requirement that an employee benefit plan fiduciary act "solely in the interest of [plan] participants and beneficiaries" with the "care, skill, prudence and diligence" that a prudent person "familiar with such matters" would employ in the circumstances (29 U.S.C. 1104(a)(1)).[7]

One "familiar with such matters" would guide his performance of a trustee's fiduciary obligations with the knowledge that contributing employers, through inadvertence, mistaken legal interpretation or fraud, do not always remit complete and accurate contributions on behalf of all covered employees. See, *e.g.*, *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260 (1983); *Bugher* v. *Consolidated X-Ray Service Corp.*, 705 F.2d 1426 (5th Cir. 1983), petition for cert. pending, No. 83-421 (filed Sept. 12, 1983); *United States* v. *S & Vee Cartage Co.*, 704 F.2d 914 (6th Cir. 1983), cert. denied, No. 83-228 (Oct. 31, 1983). Moreover, a knowledgeable trustee would appreciate that general payroll audits can facilitate recovery of significant contribution delinquencies undetectable by any other means. See, *e.g.*, *Jim McNeff, Inc.* v. *Todd*, *supra* (audit revealed that employer owed more than $5,000 on behalf of five employees that employer had never reported as covered); *Laborers Health & Welfare Trust Fund* v. *Kaufman*, *supra* (audit indicated a discrepancy exceeding $130,000 due to controversy regarding covered or non-covered status of particular non-union labor); *Bugher* v. *Consolidated X-Ray Service Corp.*, *supra* (audit uncovered more than $100,000 due on behalf of covered employees who employer erroneously believed were not covered); *Audit Services Inc.* v. *Rolfson*, 641 F.2d 757 (9th Cir. 1981) (audit revealed deficiency of more than $25,000 due to employers' failure to contribute on behalf of non-union covered employees). Accordingly, a prudent employee benefit plan fiduciary would not unquestion-

[7] Cf. 29 U.S.C. 1110, which generally invalidates, as contrary to public policy, any provision of a trust agreement that purports to limit the responsibility of any fiduciary for the performance of any fiduciary "responsibility, obligation, or duty."

ingly accept the accuracy of an employer's coverage determinations.

Generally accepted auditing standards confirm that failure to recognize the audit authority of trustees of a multiemployer pension or welfare benefit plan cripples trustees' ability to identify and collect all assets owed to the plan in a manner consistent with fiduciary standards of care. For instance, completion of an independent audit of such a benefit plan requires that the auditor investigate and be assured of the accuracy of the plan's data on the number and identity of participants. Such assurance may be gained in part from an independent check of the employer's records, and in part from an assessment of the plan's own internal safeguards to make sure that all contributions due are paid. American Institute of Certified Public Accountants (AICPA), *Audits of Employee Benefit Plans* §§ 8.4, 10.6 (1983); AICPA, *Audits of Employee Health and Welfare Benefit Funds* 20-21 (1972); AICPA, *Statement on Auditing Standards No. 1*, at AU 320.01 (1972); AICPA, *Statement on Auditing Standards No. 9*, at AU 322 & AU 322.02 (1975). These professional auditing procedures reflect an elementary—but critical—auditing principle based, at root, upon common sense:

> The auditor should determine that the population [examined] is appropriate for the specific audit objective. For example, *an auditor would not be able to detect understatements of an account due to omitted items by sampling the recorded items.* An appropriate sampling plan for detecting such understatements would involve selecting from a source in which the omitted items are included.

AICPA, *Statement on Auditing Standards No. 39* ¶17, at AU 350.17 (1981) (emphasis added). There is no reason to impute to Congress the intent to defy this common sense principle by rendering employee benefit plan fiduciaries accountable for collection of trust assets while denying them the authority needed to carry out that obligation.[8]

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[8] In fact, as explained below (see pages 22-23, *infra*), Congress generally required employee benefit plans to conform to the norms of the accounting profession in the conduct of their affairs.

2. The legislative history of ERISA provides additional evidence that the Act should be interpreted to recognize the authority of employee benefit plan trustees independently to verify that participating employers have made all contributions required of them under applicable trust agreements. Recognition of trustee auditing authority effectuates two of the major policy objectives that Congress intended to accomplish by enacting ERISA: reform of prevailing pension and welfare plan funding practices and maintenance of uniform and high standards of fiduciary responsibility for plan officials, employing the latter to advance the former. See S. Rep. 93-127, *supra*, at 9, 11; H.R. Rep. 93-533, *supra*, at 7.

The House and Senate Reports explain Congress's concern with assuring full plan funding (H.R. Rep. 93-533, *supra*, at 7; S. Rep. 93-127, *supra*, at 9-10):

> The pension plan which offers full protection to its employees is one which is funded with accumulated assets which at least are equal to the accrued liabilities, and with a contribution rate sufficient to maintain that status at all times.

Congress accordingly required that "[a]ll current accruals of benefits based on current service * * * be paid for immediately" (H.R. Rep. 93-533, *supra*, at 14). See 29 U.S.C. 1022. Congress recognized, moreover, based upon its study of pension plan failures, that one of the two leading causes of loss of individual benefit rights is "the manner in which * * * plan[s are] executed with respect to [their] contractual requirements of * * * funding" (S. Rep. 93-127, *supra*, at 5; H.R. Rep. 93-533, *supra*, at 5). In addition, Congress understood that individual employees are unable, as a practical matter, to safeguard their own pension and benefit rights (S. Rep. 93-127, *supra*, at 4; H.R. Rep. 93-533, *supra*, at 4). Thus, if the "full protection" Congress intended to provide is to be achieved, and the overriding goal of making "the private pension promise * * * real rather than illusory" attained (*id.* at 10), benefit plan fiduciaries—the only actors who are charged faithfully and singlemindedly to protect participants' interest—must have

effective means to verify the completeness and accuracy of employer contributions.[9]

The legislative history of ERISA also demonstrates that Congress was cognizant of the special attributes of employee benefit plans that distinguish them from typical trusts governed by state law. The Senate and House Reports observe that "conventional trust law" was "developed in the context of testamentary and inter vivos trusts (usually designed to pass designated property to an individual or small group of persons)," whereas "the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature" (S. Rep. 93-127, *supra*, at 29; H.R. Rep. 93-533, *supra*, at 12). Because of the large number of participants in a typical employee benefit plan, and the fact that the trust is intended to receive a continuous stream of contributions keyed to the number and identity of its employees and their functions, employee benefit plans predictably experience specia difficulty in assuring timely receipt of all of the assets to which they are entitled.

This is especially true of multiemployer plans because of the fluid structure of employment in many industries in which such plans are characteristically found. In industries such as construction and trucking, variability, brevity and uncertainty of job duration and the multiplicity of employers for some workers over the course of a year greatly multiply the opportunities for honest errors, mistaken judgments and outright fraud. See Bricklayers Fringe Benefit Funds Am. Brief in Support of the Petition 4-5. Congress's instruction that the "courts * * * interpret the prudent

[9] Congress also provided that, subject to carefully delineated exceptions, "the assets of a plan shall never inure to the benefit of any employer." 29 U.S.C. 1103(c)(1). See H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 303 (1974). Of course, the trustees' exercise of audit authority tends to effectuate this prohibition. Moreover, one of the statutory exceptions to this prohibition allows for the return to an employer of excess contributions resulting from a mistake of fact or law. 29 U.S.C. 1103(c)(2)(A). The court of appeals' decision in this case denies plan fiduciaries a comparable right to determine whether an employer has made *insufficient* contributions resulting from a mistake of fact or law.

man rule and other fiduciary standards bearing in mind the special nature and purposes of employee benefit plans" (S. Rep. 93-127, *supra*, at 29; H.R. Rep. 93-533, *supra*, at 12; H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 302 (1974)) thus dictates that the trustees of multiemployer plans be afforded auditing authority sufficient to enable them to verify the accuracy and completeness of employer contributions.

3.a. Contrary to the view of the court of appeals (Pet. App. A19, A29), checking an employer's records to verify that required contributions have been made for all covered employees, whether or not identified as such by the employer, is entirely consistent with the statutory directive that fiduciaries act solely in the interest of plan participants and beneficiaries. 29 U.S.C. 1104(a)(1)(A). Such an audit necessarily encompasses review of payroll records of persons who are not acknowledged by the employer to be covered, and will, as a practical matter, often entail examination of records of some persons who are not in fact covered. Still, the essential purpose of such an audit is to protect the interests of plan participants—both those who have erroneously been excluded by the employer in making contributions, and those who have been accurately identified as covered but whose interests are threatened by underfunding of the plan because of an employer's failure to make contributions in respect of all covered persons. See *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 465 (1977).[10]

[10] The court of appeals drew support for its conclusion that ERISA confers no auditing right upon trustees from the requirement of the statute that plan fiduciaries discharge their duties "*in* accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of . . . [ERISA]" (Pet. App. A19, quoting 29 U.S.C. 1104(a)(1)(D)). As we explain below (pages 26-29, *infra*), the particular trust agreements involved in this case support the auditing authority claimed by petitioners. But even the court of appeals, which read these agreements differently, did not seriously suggest that anything in these agreements directly *precluded* exercise of such auditing authority. Moreover, Section 1104 also requires plan fiduciaries to act under a prudent person standard (see page 12, *supra*) and to act with fidelity to the interests of participants and beneficiaries, while Section 1104(a)(1)(D)

b. Equally incorrect is the court of appeals' categorical judgment (Pet. App. A29-A30) that a prudent fiduciary is prohibited from undertaking an audit extending beyond the records of those individuals conceded to be covered and those other identifiable individuals the trustees have reasonable cause to believe are covered.[11] This limitation robs

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subordinates any contractual requirements to the other commands of the statute. The legislative history emphasizes that this statutory override was designed to void provisions that limit a fiduciary's otherwise applicable duties. S. Rep. 93-127, *supra*, at 29; H.R. Rep. 93-533, *supra*, at 12. Thus Section 1104(a)(1)(D) does not support the court of appeals' conclusion that ERISA confers no auditing authority on trustees.

[11] The court of appeals stated that the Secretary of Labor's ERISA investigations are circumscribed by a "reasonable cause" requirement and reasoned that benefit fund trustees should not be afforded any greater latitude than the Secretary (Pet. App. A30 & n.5). The court of appeals misread the statute. Although the Secretary needs "reasonable cause" to enter the premises of a plan or employer pursuant to 29 U.S.C. 1134(a)(2), the Secretary has the unqualified authority under 29 U.S.C. 1134(a)(1) to "require the submission of reports, books, and records" in connection with an investigation. See, *e.g.*, *Donovan* v. *National Bank of Alaska*, 696 F.2d 678, 684-685 (9th Cir. 1983); *Donovan* v. *Shaw*, 668 F.2d 985, 990 (8th Cir. 1982). The requirements of the two subsections plainly are not interchangeable. Cf. *Donovan* v. *Lone Steer*, No. 82-1684 (Jan. 17, 1984), slip op. 6-7.

At the same time, somewhat paradoxically, the court of appeals also suggested that the interests of employees for whom contributions are not being made can be adequately protected by the Secretary of Labor (Pet. App. A33). Although we take a broader view of the Secretary's investigative authority than the court of appeals did, we cannot agree that Congress intended that the Secretary's investigative authority be the exclusive—or even the primary—instrument for verifying the completeness of employer contributions. Indeed, Congress expressly withheld from the Secretary authority to bring suit to collect delinquent employer contributions due to a multiemployer plan. See 29 U.S.C. 1132(b)(2), 1145. Because the authority to pursue such delinquencies, once discovered, rests with plan trustees, it is unlikely that Congress withheld complementary auditing authority from trustees. The Secretary has informed us that approximately 900,000 benefit plans file annual reports with him. Between 11,000 and 12,000 of these are multiemployer plans. It is thus wholly unrealistic to suggest that centralizing all auditing authority in the Secretary would provide protection to benefit plan participants comparable to that afforded by trustee audits.

the trustees' auditing authority of the ability to uncover previously unsuspected delinquencies in contributions.[12] It would reward concealment of such delinquencies and would, contrary to fundamental precepts of fiduciary responsibility, force trustees to rely heavily upon the probity and accuracy of determinations made by contributing employers. The court of appeals' decision thus is irreconcilable with Congress's desire to use duties and standards derived from the common law of trusts "to make as certain as possible that pension fund assets would be adequate" to pay benefits due (*Nachman Corp.*, 446 U.S. at 375). It constrains plan trustees from employing reasonable means that are well-suited to the performance of their fiduciary duties.[13]

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[12] If trustees' auditing authority is limited to suspected delinquencies it does relatively little to complement and support the trustees' authority to enforce contribution requirements through legal proceedings. Under 29 U.S.C. 1132 plan fiduciaries are authorized to bring suit to collect delinquent contributions, and may also seek "such * * * equitable relief as the court deems appropriate." Certainly when the trustees have reasonable cause to suspect delinquencies they may file an action under this provision and the district court may direct that an audit be completed. But litigation to collect delinquent contributions may not be commenced without cause to believe that there is "good ground to support it." Fed. R. Civ. P. 11; see *United States* v. *Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 24 n.12 (Burger, C.J., dissenting). Section 1132 thus presumes that plan fiduciaries have means to discover delinquencies that will enable them to avail themselves of an enforcement action.

[13] The court of appeals' speculation (Pet. App. A29-A30) that the proposed audit would pr ve unacceptably expensive is unfounded. Under generally accepted auditing standards, auditors would restrict their initial investigation to a small statistical sample of the total universe of employees. A more extensive sample would be reviewed only if the initial audit revealed significant problems with the employer's reporting. See AICPA, *Audits of Employee Benefit Plans*, *supra*, §§ 10.5, 10.6. Moreover, if a plan's independent auditor, whose unqualified opinion must be included in the plan's annual report to the Secretary (see pages 22-23, *infra*), cannot rely on the plan's own methods for verifying completeness of contributions, the independent auditor would itself be required to verify that information with the employer. Thus, whatever expense may be associated with a prudently delimited audit simply cannot be avoided. In any event, the court of appeals completely overlooked the enhancement of plan assets that

4. The tension between the critical role that Congress expected plan fiduciaries to play in assuring the financial soundness of benefit plans and the restricted scope of the auditing authority recognized by the court of appeals is exacerbated by the court's extremely restrictive application of the "reasonable cause" standard it announced (see page 7, *supra*). Surely, when an audit limited to payroll records of concededly covered employees uncovers significant employer contribution deficiencies, as it did in this case, prudence dictates that further auditing be undertaken to verify whether contributions are being made for all covered employees. Even if particularized suspicion were required, petitioners' trustees had ample reason to investigate further here.

C. Other Provisions Of ERISA Demonstrate That Congress Intended That Plan Trustees Be Permitted To Audit A Participating Employer's Payroll Records

Under ERISA Congress imposed stringent reporting requirements on employee benefit plan trustees in order to enable participants and beneficiaries, as well as the Secretary of Labor, to ensure that trustees fulfill their duties. "[T]he safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection." S. Rep. 93-127, *supra*, at 27; H.R. Rep. 93-533, *supra*, at 11. Several of the specific reporting and disclosure requirements imposed upon employee benefit plans independently confirm that Congress expected such trustees to be able to audit employer payroll records to verify the accuracy of employer identification of covered employees.

First, in order to permit "better assessment of * * * plan[s'] financial soundness by administrators and participants alike" (S. Rep. 93-127, *supra*, at 28), ERISA requires that the annual reports of employee benefit plans filed with the Secretary of Labor include the opinion of an independent public accountant as to whether the financial statements contained in the report are accurate and pre-

typically results from meticulous enforcement of employer contribution requirements. See pages 5, 15, *supra*.

sented "in conformity with generally accepted accounting principles." 29 U.S.C. 1023(a)(3)(A). To provide a foundation for rendering such an opinion, the independent auditor is to undertake "such tests of the books and records of the plan as are considered necessary" under "generally accepted auditing standards" *(ibid.)*. If the independent accountant presents a materially qualified opinion, the Secretary may reject the annual report and order a second audit or bring an enforcement action against the plan. 29 U.S.C. 1024(a)(4)(B), (5)(A) and (C).

As explained above (page 16, *supra*), generally accepted auditing standards require that employer records be available to confirm the accuracy of coverage determinations and the adequacy of plan funding, particularly in the case of an audit of a multiemployer plan,[14] If neither the employee benefit plan's internal auditor nor the independent auditor has access to employer payroll data, the independent auditor generally will be obliged to express a qualified opinion or to disclaim an opinion (AICPA, *Audits of Employee Benefit Plans*, *supra*, § 12.17), thereby rendering the plan's annual report subject to rejection by the Secretary. It is thus essential for plan operation under ERISA that employer records needed to verify the completeness of the employer's contributions be available for audit. Plainly Congress expected that plan fiduciaries and their auditors would be able to undertake such examinations.

The same conclusion follows from 29 U.S.C. 1023(c)(1). Under that section, the annual report required to be filed with the Secretary of Labor by the plan administrator must

[14] In preparing an opinion for a plan's annual report, an independent accountant must determine whether the plan has properly assessed all employer contributions due. In doing so the accountant considers "[w]hether covered employees have been properly included" in employers' contribution reports. AICPA, *Audit of Employee Benefit Plans*, *supra*, §§ 8.2(a), 10.2(a). In assessing a multiemployer plan's identification of covered employees, "the [independent] auditor may need to make special arrangements to examine employer records" (*id.* § 8.4) including "testing whether the data maintained [in the fund's files] correspond to the data maintained in employer payroll and personnel files" (*id.* § 10.5(d)).

reflect the number of employees covered by the plan. Congress unquestionably understood that plan fiduciaries would have access to the information and records necessary to determine that figure reliably and independently.

Finally, 29 U.S.C. 1059 mandates that such employer records be open to plan fiduciaries. Under Section 1059(a)(1) and (2) (emphasis added), an employer participating in a multiemployer plan is required to "furnish to the plan administrator the information necessary for the administrator to maintain" records "with respect to *each* [of the employer's] employees sufficient to determine the benefits due or which may become due to such employees." This requirement obviously would not be satisfied if the information provided by an employer—or the records maintained by the plan—were limited to persons an employer concedes to be covered.[15] In addition, Section 1059(a)(1) and (2) requires each employer to "furnish to the plan administrator the information necessary" to enable the administrator to render a report "to each employee who is a participant under the plan" stating the extent of his accrued benefits thereunder, whenever such a report is requested or in certain other circumstances. Like Section 1023(c)(1), Section 1059 necessarily assumes that plan fiduciaries will have access to information necessary to enable them correctly to determine the identity of plan participants.[16]

D. The Court Of Appeals' Decision Is Inimical To The Objectives Of ERISA

In enacting ERISA, Congress sought to assure that participating employees and their beneficiaries would have fiscally sound benefit plans available to them. See *Pension*

[15] The term "employee" as used in ERISA is defined to include all persons working for an employer. 29 U.S.C. 1002(6).

[16] Employers that falsify information that plans must use in meeting their reporting requirements may incur criminal penalties under 18 U.S.C. 1027. See *United States* v. *S & Vee Cartage Co.*, *supra*. In addition, a civil penalty of $10 is payable to the Secretary for "each employee" with respect to whom an employer fails to furnish information required to be supplied under Section 1059(a). 29 U.S.C. 1059(b). Plan fiduciaries' exercise of auditing authority assists in the enforcement of these penalty provisions.

Benefit Guaranty Corp. v. *R.A. Gray & Co.*, slip op. 1-2. Congress recognized that employer contribution delinquencies pose a serious threat to the financial soundness of multiemployer plans. See, *e.g.*, 126 Cong. Rec. 23039 (1980) (statement of Rep. Thompson).[17] Audits of employer records by plan fiduciaries to verify that all contributions due have been remitted are an invaluable tool for detecting employer delinquencies before plan soundness is substantially undermined.

Accordingly, the decision below, if affirmed, will have a substantial deleterious impact upon the administration of employee benefit trust funds and will create substantial uncertainty for fiduciaries as to the scope of their obligations. As indicated above, the court of appeals' decision sharply restricts the tools available to employee benefit plan trustees to carry out their responsibilities—responsibilities Congress deemed essential to the "continued well-being and security of millions of employees" (29 U.S.C. 1001(a); see also 29 U.S.C. 1001a(a)(3)).

The court of appeals' decision also will exacerbate the fiscal problems that affect multiemployer plans because of employer contribution delinquencies by hindering trustees' ef-

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[17] Representative Thompson, one of the floor managers of the Multiemployer Act, described the various kinds of problems presented by such delinquencies (126 Cong. Rec. 23039 (1980)):

> Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies * * *.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, * * * uncollected delinquencies can add to the unfunded liability for all employers.

Accord, Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980, S. 1076: Summary and Analysis of Consideration* 43-44 (Comm. Print 1980).

forts to assure that such plans receive all contributions due. Pension plans must pay benefits to eligible participants and beneficiaries whether or not the employer has made required contributions to the plan on behalf of the particular employees. *Van Gunten* v. *Central States*, 672 F.2d 586, 589 (6th Cir. 1982).[18] Accordingly, undetected contribution deficiencies, however caused, can result in underfunding of plans and threaten the interests of those who depend on them.

Finally, the court of appeals' decision inevitably will encourage employer resistance to audits and will make funding delinquencies substantially harder to detect—especially before they have ripened into serious financial difficulty for a plan. Trustees who lack authority to audit general payroll records must depend on the employer voluntarily to provide the information needed to assure that contributions are being made for all eligible employees. The decision below thus will frustrate the efforts of plan trustees to fulfill their fiduciary duties, create confusion as to the extent of their obligations, and breed litigation. The decision may also discourage trustees from exercising the utmost diligence in protecting the interests of all persons entitled to benefits under employee benefit plans.

II. THE TRUST AGREEMENTS AUTHORIZE PETITIONERS' TRUSTEES TO AUDIT RESPONDENTS' PAYROLL RECORDS TO ENSURE THAT ALL REQUIRED EMPLOYEE BENEFIT PLAN CONTRIBUTIONS HAVE BEEN MADE

1. Based on the foregoing considerations, we conclude that Congress contemplated that employee benefit plan trustees have the authority to verify the sufficiency of em-

[18] See also Dep't of Labor Advisory Op. No. 76-89 (Aug. 31, 1976) (Pet. App. A70-A71). We know of no support for the court of appeals' speculation (Pet. App. A33-A34) that a covered employee on whose behalf no contributions were made might be estopped from claiming benefits under a plan. The legislative history of ERISA makes clear that Congress rejected any suggestion that individuals should lose their benefits because of their neglect to uncover an employer's failure to make required contributions on their behalf. See page 17, *supra*.

ployer contributions. But even if there were doubt as to whether ERISA itself should be read to *confer* authority upon benefit plan trustees to undertake such audits, the court of appeals' view that provisions of ERISA should be read to *limit* the contractual grant of authority contained in the trust agreements in this case would be wholly untenable. As we have indicated above, verification of an employer's coverage determinations is not inconsistent with either the prudent person standard of care or the statutory requirement of fidelity to the interests of covered persons. Thus, ERISA requires at a minimum that the provisions of a trust agreement that authorize trustees to enforce the contribution obligations of the employer be given a liberal, commonsense interpretation that will enable the trustees to fulfill their role as guardians of all participants' interests.

Read in this manner (or, indeed, read literally), the access-to-records provisions of the trust agreements, Article III, Section 5 (see pages 3-4, *supra*), make clear that the trustees are not limited to examination of records of employees either who are acknowledged by the employer to be covered or who the trustees have reasonable cause to believe have been erroneously excluded. The trust agreements expressly require participating employers to provide the trustees not only with information on covered employees, but also with "such other information as the Trustees may reasonably require in connection with the administration of the Trust." The agreements further authorize the trustees to examine "the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust" (Pet. App. A46).

This contractual language is sweeping and unqualified; trustees' access to employer records turns simply upon the *trustees'* assessment that examination thereof would be "*advisable*" in connection with the performance of their duties. In light of the breadth and the structure of the contractual language, and the fact that uncertainty and disputes as to coverage of particular individuals are a fixture of pension plan operation, this language can only be fairly

read to authorize the trustees to review employer documents necessary to confirm independently that all contributions due have been made. Certainly, the trustees' interpretation of the trust agreements as conferring auditing authority upon them is neither arbitrary nor unreasonable and is plainly consistent with the language of the agreements. Accordingly, under Article IV, Section 17 of the trust agreements (see page 4, *supra*), that interpretation is binding upon respondents. See *Roark* v. *Lewis*, 401 F.2d 425 (D.C. Cir, 1968); *Miniard* v. *Lewis*, 387 F.2d 864 (D.C. Cir. 1967); see also Art. III, § 4 & Art. IV, § 14(e) (quoted at pages 3-4, *supra*).

In *Schneider Moving & Storage Co.* v. *Robbins*, No. 82-1860 (Apr. 18, 1984), this Court read Article III, Section 5 of the trust agreements at issue here in precisely the manner we advocate (slip op. 5 (footnote omitted)):

> To ensure compliance with the contribution requirements, the trust agreements gave the trustees the authority to examine [the employers'] payroll records. If the trustees determined that [the employers] were not complying with their contribution requirements, they had the authority under the trust agreements to initiate legal proceedings to enforce those requirements * * *.

The Court thus indicated that, contrary to the view of the court of appeals in this case, the trustees' audit authority is available for the purpose of *uncovering* an employer's failure to make required contributions, and not merely to confirm suspected delinquencies.

2. The court of appeals' decision conflicts with *Schneider Moving & Storage Co.* in another significant respect as well. Contrary to the court of appeals' analysis (see page 8, *supra*), this Court squarely rejected the premise that petitioners' trustees are obliged to rely upon the union or the arbitration mechanism provided in the collective bargaining agreement to enforce the contribution obligations of participating employers (slip op. 8-12). To be sure, the court of appeals did not completely subordinate the trustees' enforcement responsibilities to the labor-management arbitral process here. But the court of appeals' reasoning that the auditing authority of trustees should be limited so

as to defer to that process (see Pet. App. A30-A31) is inconsistent with this Court's recognition (slip op. 11) that the interests of the trustees and the union are not congruent. In any event, the effect of limiting the trustees' authority to cases where a concrete controversy exists as to the coverage of an identified employee is quixotic. So confined, the trustees' audit authority affords no protection to their distinctive interest in uncovering unsuspected delinquencies, while it tends to duplicate the union's role in resolving identified controversies as to particular employees.

Here, as in *Schneider Moving & Storage Co.*, slip op. 9, it is "unreasonable to infer that these parties [to the trust agreements] would agree to subordinate" the trustees' enforcement authority to the procedures specified for resolution of other kinds of disputes under collective bargaining agreements between employers and the union. No evidence of any such intention has been adduced.[19]

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[19] The court of appeals' statement that its restrictive interpretation of the trustees' audit authority under the trust agreements "preserves and promotes confidentiality of non-covered employee records" (Pet. App. A31) is difficult to comprehend. Neither the court of appeals nor respondents have suggested that non-covered employees have any legal right that bars the trustees' examination of a participating employer's payroll records. Moreover, there is no reason to believe that trustees' access to employer records threatens the interests of non-covered employees; once trustees have verified the identity of non-covered employees, payroll information on non-covered employers will be of no interest or use to them. Finally, an employee benefit fund trustee is a fiduciary, charged to act exclusively in the interests of plan participants and beneficiaries and to "overcome any loyalty to the interest of the party that appointed him" (*NLRB* v. *Amax Coal Co.*, 453 U.S. at 334). Thus no trustee could properly employ payroll data relating to non-covered employees in a manner hostile to the interests of such employees—or those of the employer. Cf. *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967) (employer's duty, under the NLRA, "to provide information that is needed by the bargaining representative for the proper performance of its duties"). In any event, an employer's confidentiality concerns may be met by expressly requiring data on non-covered employees to be held in confidence and by restricting records produced for the trustees' audit to use in the performance of the trustees' fiduciary duties. It is at least arguable that such a limitation is found in Article III, Section 5 of the trust agreements,

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1984

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which grants access to records only "in connection with the proper administration of the Trust" (Pet. App. A46).